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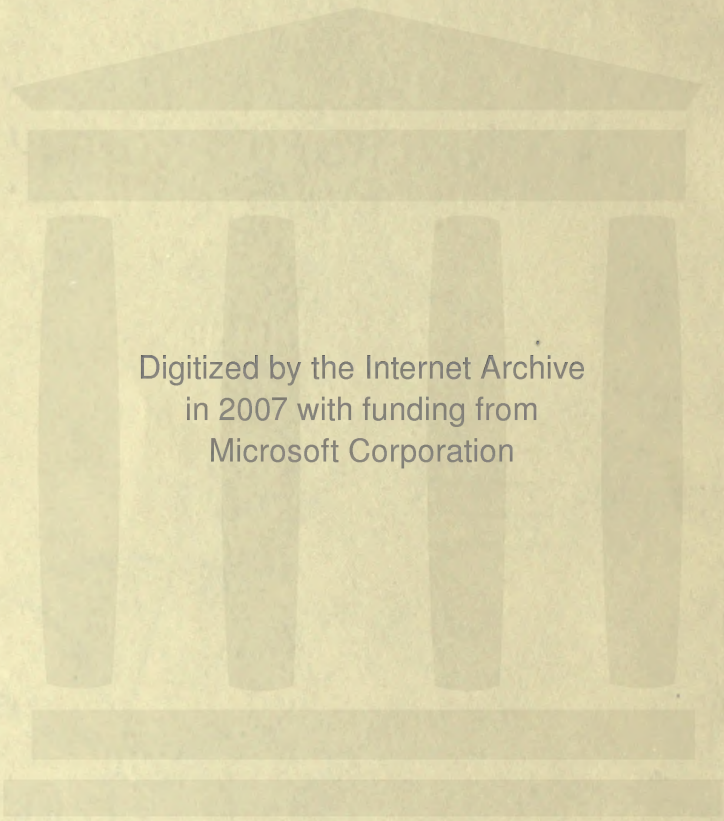

THE ANTI-TRUST LAW

AND THE

RAILROAD PROBLEM.

An argument in favor of so amending the Act as to bring it into conformity with its intent, as expressed in its title.

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THE ANTI-TRUST ACT AND THE RAILROAD PROBLEM.

The Act of July 2, 1890, known as the "Sherman Law," and also as "The Anti-Trust Law," is entitled "An Act to protect trade and commerce against *unlawful* restraints and monopolies." This expresses what is generally conceded to be a constitutional and laudable object of legislation. But the statute, in its first and third sections, declares that "Every contract, combination in the form of trust or otherwise—in restraint of trade or commerce—is hereby declared to be illegal," and the Supreme Court of the United States has ruled that these words make unlawful every contract or agreement in restraint of trade or commerce, whether partial or general, reasonable or unreasonable, just or unjust, protective of the public interests or detrimental to the public interests. The Supreme Court has also decided that the Act excludes the exercise of the judicial function from the determination of contracts in restraint of trade. The legislator had no adequate conception of these judicial conclusions at the time of the passage of the Act. As hereinafter explained, the Act of July 2, 1890, in this as in other respects, was a palpable legislative misadventure. This untoward result is clearly attributable to the fact that the Act was passed without any previous legislative investigation or inquiry into the merits of an exceedingly complex and difficult subject involving the interests of commerce and productive industry, and the integrity of the judicial power in the United States.

It is the purpose of this paper to show that the Act of July 2, 1890, should be so amended as to apply only to "unlawful restraints and monopolies," as indicated in its title, or, in other words, only to unreasonable or unjust restraints or regulations of trade or commerce.

A LEGISLATIVE MISADVENTURE.

The suppression of industrial trusts and monopolies was, beyond all question, the fundamental object of the Act of July 2, 1890. The first case under the Act to receive final adjudication was the so-called "Sugar Trust Case," U. S. *v.* E. C. Knight Co. and others (156 U. S., 1). This case originated in a bill filed by the United States in the Circuit Court for the Eastern District of Pennsylvania. The Circuit Court held that the facts did not show a contract, combination or conspiracy to restrain or monopolize trade or commerce "among the several States or with foreign nations," and dismissed the bill (60 Fed. Rep., 306). The cause was then taken to the Circuit Court of Appeals for the Third Circuit, where the decree was affirmed. An appeal was subsequently prosecuted in the Supreme Court of the United States, Mr. Chief Justice Fuller delivering the opinion of the Court, which sustained the decision of the courts below. The Supreme Court ruled that the Act in question, being based upon the commercial clause of the constitution, has no reference to productive industry. In elucidating this point the Court said: "That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the police power of the State."

The Court further stated that the regulation of manufactures, because intended to become the subject of commerce, would be to invest Congress "with the power to regulate not only manufactures but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short every branch of human industries." The Court also remarked upon the absurdity of any attempt to invest Congress with such multiform and incongruous functions, explaining that this would deprive the States of their proper powers and stultify our whole federative system. This is elementary,

and indicates that the Act of July 2, 1890, with respect to its main purpose, was a legislative misadventure.

The error just noted has since been recognized by Congress, there having been introduced in the House of Representatives of the 56th Congress a joint resolution proposing to amend the Constitution of the United States by conferring upon Congress the power to *define*, regulate and prohibit combinations of every description. Evidently the first step to have been taken in legislating upon a question so complex and involved as that to which the Act of July 2, 1890, relates, was to determine the distinction between lawful and unlawful restraints upon trade or commerce, and thus to furnish a definition upon which the courts could base judicial procedure. This the joint resolution proposed to do. The lack of such inquiry in advance of its enactment constitutes additional evidence that the Act of July 2, 1890, was a legislative misadventure.

APPLICATION OF THE ANTI-TRUST ACT TO RAILROAD TRANSPORTATION.

An attempt was next made to apply the Act of July 2, 1890, to interstate commerce on railroads. The Attorney General of the United States was induced to file a bill of complaint against the Trans-Missouri Freight Association, an organization formed for the purpose of securing the orderly conduct of transportation over the railroads in the territory lying approximately between the western boundaries of the States of Louisiana, Arkansas and Missouri and the Missouri River at the east and the Pacific Coast of the United States at the west.

The bill in this case was filed by the Government for the purpose of having the agreement declared illegal and void under the provisions of the Act of July 2, 1890, and of having the Association dissolved as being in the nature of an agreement in restraint of trade. The case was dismissed

by the Circuit Court of Kansas, in which it had been filed. Subsequently it was appealed to the Circuit Court of Appeals for the Eighth Circuit, where the judgment of the Circuit Court was affirmed. The Government then appealed the case to the Supreme Court of the United States, where it was decided March 22, 1897, five of the justices uniting in an opinion that the compact was invalid, and four of the justices uniting in a strenuous dissent prepared by Mr. Justice White.

Subsequently the Attorney-General of the United States at the instance of the Interstate Commerce Commission instituted like proceedings against the Joint Traffic Association, an organization formed for the purpose of securing the orderly conduct of thirty-one of the principa railroads engaged in the business of transportation between the Atlantic Seaboard north of the State of North Carolina at the east, the States of North Carolina and Kentucky at the south and Chicago and certain Mississippi River points at the west.* The judicial result in this case was similar to that in the Trans-Missouri case.

Of the sixteen jurists who heard the two cases, *six*, including five justices of the Supreme Court, and one judge of the Circuit Court of Appeals for the Eighth District, declared the sort of agreement in the two cases to be invalid under the Act of July 2, 1880, while *ten* declared it to be valid and not affected by the Act. This diversity of judicial opinion, involving as it does commercial and economic considerations of national importance as well as fundamental questions of constitutional law and of government, has left the public mind in great doubt both as to

*Senate Document No. 54, 55th Congress, 1st Session, page 4. In a communication to the Senate, dated March 12, 1896, the Interstate Commerce Commission stated that "three several proceedings are now pending in the United States courts, instituted by the Commission, or upon its request, to test the legality of such associations, their actions and doings." All these cases involved the validity of railroad associations under the Anti-trust Act. Senate Document 171, 54th Congress, 1st Session.

the policy of the act and as to the correctness of the judicial conclusion reached. It is here proposed to consider some of the more important of these questions in their commercial and economic bearings and upon considerations of public policy.

THE IMPORT OF THE ACT OF JULY 2, 1890, AS DETERMINED IN THE RAILROAD CASES.

In deciding the Trans-Missouri and Joint Traffic railroad cases, the Supreme Court of the United States adopted a political doctrine in regard to which a wide diversity of opinion prevails, both among jurists and statesmen, namely, that the judiciary is powerless to declare an Act of the legislature void for the reason that it violates some abstract principle of justice, in the absence of any constitutional prohibition This is clearly expressed by the Court in the Trans-Missouri case as follows: "The public policy of the government is to be found in its statutes." "Public policy in such a case is what the statute enacts." And again, "If the law prohibit any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject." This conclusion was emphasized by the declaration that if the act should be disastrous in its results, or proved to be opposed to accepted views of public policy "Congress is the body to amend it, and not this Court by a process of judicial legislation wholly unjustifiable."

The Court also ruled that the words of the act, "Every contract in restraint of trade," make unlawful all restraints upon the conduct of trade or commerce whether just or unjust, reasonable or unreasonable, protective or detrimental to the public interests. Again, in speaking of the purposes which the legislator had in mind the Court de-

clared that "Congress might have deliberately decided to prohibit all agreements and combinations in restraint of trade or commerce, regardless of the question whether such agreements were reasonable or not." This distinctly proclaims the doctrine that Congress may suspend the rule of justice in the absence of any specific constitutional inhibition of the same.

The position taken by the Court is also clearly indicated as follows:

The fundamental objects of the contract between the companies in the Trans-Missouri case as stated by the four dissenting justices of the Supreme Court, and not denied by the five justices who rendered the decision of the Court, were as follows:

FIRST. It provided for a uniform classification of freight.

SECOND. It provided against sudden and arbitrary, but entirely legal rates.

THIRD. It provided against secret and criminal rate-cutting in violation of established legal rates.

The second and third of these objects are features of the Interstate Commerce Act, and the first is universally conceded to be a just and necessary feature of properly regulated freight traffic. As hereinafter shown these provisions were dictated by generally approved considerations of public policy, and were absolutely essential features of our grand united American Railroad System of transportation; and yet, as determined by the Court, the contract of which they were essential features was illegal.

Again the four dissenting justices of the Supreme Court declared that the Act of July 2, 1890, as construed by the Court, is "a departure from the general principles of law," and "violative of the elementary principles of justice." These allegations were not denied by the Court, for they did not invalidate its decision.

The foregoing statements clearly indicate the position taken by the Supreme Court upon the general principle and specific provisions of the Anti-Trust Act of July 2, 1892, namely:

FIRST. The judiciary is powerless to declare an act of the legislature void for the reason that it violates some abstract principle of justice when there is no constitutional prohibition.

SECOND. The Act of July 2, 1890, in declaring every contract in restraint of trade or commerce to be unlawful, although opposed to fundamental principles of justice and of public policy, is not invalidated by any express provision of the constitution.

THIRD. The act of July 2, 1890, applies to railroad transportation.

These conclusions involve questions of constitutional law relative to the structural features of our government. It is not my purpose to discuss these questions in this connections, further than to attempt to prove from the lessons of experience that the Act is subversive of the fundamental principles of justice and liberty, and that it is fraught with great danger to the commercial, industrial and financial interests of this country.

THE APPLICATION OF THE ACT OF JULY 2, 1890, TO CONTRACTS BETWEEN RAILROAD COMPANIES.

The application of the provisions of the Act of July 2, 1890, to contracts between railroad companies was a question which gave the Supreme Court deep concern. This is evident from the language employed in its decision. First, the Court perceived that a decision to the effect that the Act does not apply to railroad transportation would be equivalent to declaring it to be utterly void. Referring to the decision in the Sugar Trust and other industrial cases,

the Court said "To exclude agreements as to rates by competing railroads for the transportation of articles of commerce between the States would leave little for the Act to take effect upon."

And again:

"It is readily seen from these cases that if the Act does not apply to the transportation of commodities by railroads from one State to another or to foreign nations, its application is so limited that the whole Act might as well be held inoperative."

In these, as in other utterances, it clearly appears that the Court felt itself under some sort of moral obligation to apply the Act to railroads if possible.

But a weightier consideration added to the embarrassment of the Court. It was clearly perceived that serious political troubles might follow a conclusion which in a manner affecting vast public interests would suppress the exercise of the function of the judiciary and in lieu thereof substitute the autocratic exercise of the legislative authority. Furthermore the Court perceived the trouble which might be engendered by a decision which, as the four dissenting justices declared "is a departure from the general principles of law" and "violative of the general principles of liberty," a declaration not denied by the court. It was evident from these and other considerations that the decision would grate harshly upon the public mind. Accordingly the Court had recourse to an attempted defense of the law through an elaborate course of reasoning which may be regarded as in the nature of judicial apologetics.

The particular assumptions upon which this feature of its decision is based are as follows:

1. The railroads of the United States are independent and responsible competitors and are to be adjudged as are competing carriers on free highways of commerce.

2. While a restraint upon trade by a private corporation might be valid under the general principles of law, in the absence of a statute prohibiting the same, such restraint by a railroad company "as affecting its rates of transportation *must thereby be prejudicial to the public interests.*"

3. Free competition is the general and inviolable law of trade.

The precise point intended to be proved by the Court was that every restraint upon railroad rates of transportation is necessarily an unjust restraint upon trade, and therefore illegal, even at common law.

As each one of the foregoing propositions is based upon economic and commercial principles not involved in the legal and constitutional consideration of the case, I shall attempt to prove that they are one and all absolutely fallacious.

THE CHARACTER OF THE RAILROAD AS A HIGHWAY OF COMMERCE AND ITS RELATIONS TO THE PUBLIC INTERESTS.

The assumption of the Supreme Court that *the railroads of the United States are independent and responsible competitors and as such are to be adjudged as are competing carriers on free highways of commerce* is one involving a brief consideration of the railroad as a highway of commerce.

The railroad while perfectly free to every shipper is not and never can be a free highway of commerce to any and every carrier. This is dictated by considerations of economy, of safety and of efficiency. At first the different railroads of the country were disassociated. Railroad managers then carefully avoided the entangling alliances which might result from joint traffic or a common use of roadway or vehicles. But the social, commercial and political forces of the country completely set aside these objections. A common track gauge was in time adopted, tracks were con-

nected, union depots were established and all the facilities necessary for joint traffic were provided. In time the tendency toward the organic unity of the railroad system became too strong even for the united opposition of all the railroad managers of the country. The demands of commerce and industry for through traffic over connected lines were irresistible. Besides the National and State Governments came to the help of the merchant, the manufacturer, the miner, the shipper and travelers generally in their demands for the continuity of traffic. State Governments extended to railroad companies of other States solicitous invitations to extend their roads across State lines and thus to connect with the roads of contiguous States and to become legally associated under corporate laws enacted for the purpose. The National Government at first by special statutes, and finally by general law, provided that railroad companies might build bridges across navigable streams forming State boundary lines, and by the Act of June 15, 1866, commonly known as "The Charter of the American Railroad System," Congress fully authorized "continuous lines for the transportation of passengers, troops, government supplies, mails, freight and property on their way from one State to another." Thus the physical unification of the American Railroad System with all that it implies of organic unity was the outcome of an irresistible popular demand.

This subjected the railroads to radically different conditions from those which prevail on free highways of commerce. Incidentally but unavoidably it imposed stringent restraints both upon rates and upon competition.

2. Competing railroads differ from competing carriers on free highways of commerce in vitally important particulars with respect to the establishment of rates. The physical unification of the railroads of the country begat a strenuous and irresistible demand for a common basis of charges for traffic. During the period of disassociated rail-

road operations each line was a law unto itself in all matters relating to rates and charges. In this respect each road conformed to the custom of the free highway of commerce, but all this was soon set aside. The physical unification of the American Railroad System involved first of all the establishment of common classifications of freights. This constituted at once the basis of rate making and of all traffic unity. In its last annual report the Interstate Commerce Commission stated that prior to the year 1887 there were 138 different classifications in the area east of a line drawn from Chicago to St. Louis and the Mississippi River and north of the Ohio and Potomac Rivers. Now there is but one freight classification in all that vast commercial area. One classification prevails among the railroads between the Mississippi River and a line from Chicago to St. Louis at the east and the Pacific Coast at the west and one classification prevails throughout the territory south of the Ohio and Potomac Rivers and east of the Mississippi River. This uniformity of classification unavoidably constitutes a conventional restraint upon rates, and therefore upon trade or commerce, more potential than any rate agreement ever entered into between railroad companies. At the same time it is a condition making rate agreements imperative. The whole country demanded common classifications and this demand has been repeatedly voiced by the Interstate Commerce Commission in its several annual reports. The idea of abrogating the restraints upon trade and commerce interposed by the the common classifications mentioned which constitute the basis of all rate cations would now be violently opposed throughout this country.

3. A third feature of the unified American Railroad System entirely changed the character of the railroad as a highway of commerce and forbade that it should be adjudged by the laws which apply to free public highways.

I refer to rate agreements arising out of the exigencies of administration. This needs a word of explanation. As the result of the physical and traffic unification of railroads competition between rival lines was engendered to an extent never before realized. The facilities provided for joint and competitive traffic also created an unprecedented competition between commercial and industrial forces. This, in turn, gave an unwonted intensity to the competition of transportation lines. Thus entangling alliances and complications were created much more embarrassing to railroad managers than had ever been dreamed of by the conservative adherents to the old disassociated method of railroad management. The result was a general demoralization not only of rates, but also of prices, each reacting violently upon the other, and setting the commerce and the industrial interests of the country into confusion. In consequence, it became absolutely necessary to delegate the rate-making function to a multitude of traffic agents in various parts of the country. But these agents unavoidably fell into competition with each other and with no restraint upon their individual operations arising out of that caution which attaches to ownership and constitutes the conservative element in all free interaction between disassociated competitors. This gave rise to difficulties which for years baffled the skill even of the most assiduous and astute railroad managers. Twenty years ago Albert Fink, one of the ablest railroad managers of this country, thus accurately described the general railroad traffic situation in a communication addressed to me in my then official capacity as Chief of the Division of Internal Commerce of the Treasury Department:

"The stockholders in the first place surrender their control to a board of directors, the board of directors surrender it to the president, the president surrenders it to a general manager, who in turn surrenders it to the general freight

agents of his own and a great number of other roads, who again surrender it to a large number of soliciting agents, and finally these soliciting agents surrender it to the shippers. The shippers practically make their own rates. The result is confusion and demoralization of traffic, and no end to unjust discriminations between shippers and localities."

The experiences and conditions thus described were the natural outcome of the evolution of the American Railroad System, and constituted an intermediate stage in the course of that evolution.

At last it became evident that the great and deftly united organism of transportation which had been created by forces beyond the control of any or of all the railroad companies must become the subject of restraint through some sort of administrative control in the nature of co-operative self-government. The history of the development of railroad associations, designed for the purpose of effecting this object, is briefly sketched on pages 9 to 24 of a recent volume from my pen, entitled "The Community of Interests' Method of Regulating Railroad Traffic." One of the main purposes of these associations was to meet the following just and imperative public demands in regard to rates:

1. All agreed rates must be published.

2. All published rates must be adhered to until changed by due public notice.

3. Rates must not unjustly discriminate with respect to persons, places and commodities.

These stringent restraints upon rates have been incorporated into the Act to Regulate Commerce, and are now enforced by the Interstate Commerce Commission.

The regulations just noted were also enforced by the railroad companies through the best guarantees available for the purpose under the scheme of administrative control adopted.

Railroad traffic associations formed in various sections of the country in an admirable manner secured a benificent and fairly successful control of the abuses which had arisen and obviated the disastrous consequences which at first followed unbridled competitive warfare between the railroad companies, but primarily and more potentially between rival commercial centres and productive industries.

This method of self government did not secure perfect stability of rates, for at times wars of rates prevailed. Still it maintained the principle of self-restraint intact, and probably to a degree not exceeded by any regulative rule governing industrial interaction. The very imperfection of all such rules, be they statutory or of mutual consent, has its conservative aspects, for whenever commerce becomes absolutely fixed, it will not be long thereafter that it will become asphyxiated. This is especially true in a progressive country of vast resources and ever changing conditions like the United States.

The story of the various efforts of the railroad companies to perfect such controlling organizations as those above described has been many times told and need not be repeated here.

The particular rate agreements which according to the decision of the Supreme Court of the United States are forbidden by the Act of July 2, 1890, were those which were necessitated by the physical and traffic unification of the American Railroad System, and were unavoidable incidents of the administrative control of the railroads which was secured by such associations.

But a wave of populistic opposition to all forms of combination and of blind faith in the assumed beneficence of uncontrolled competition swept over the land. An unreasoning demand arose for the suppression of those co-operative arrangements whereby the unification of the railroads of the country had been accomplished under co-operative

measures constituting the administrative government of the American Railroad System, the result not of convention, but of an evolutionary movement. This revolutionary and destructive opposition to all the protective and enabling restraints and limitations and to all the co-operative agencies which render possible our complex and highly organized systems of commerce, of transportation and of industry in this progressive age is clearly expressed in the language of the first section of the Act of July 2, 1890—"Every contract, combination in the form of trust or otherwise in restraint of trade or commerce—is hereby declared to be illegal." If this act read "*unlawfully*, *unjustly* or *unreasonably* in restraint of trade" and thus was in conformity with the established policy of the law and the fundamental principles of liberty and justice no fault could be found with it; but according to the ruling of the Supreme Court of the United States it abolished these co-operative restraints which had rendered our vast and beneficent American Railroad System possible.

The disastrous results which would have followed this revolutionary procedure were measurably averted by the fact that the great railroad corporations of the country maintained tacit agreements to hold themselves subject to those restraints which sustain the harmonious workings of the vast and complex American Railroad System. Such agreements were expressions of competition rather than of combination. They were defensive and not affirmative expedients. But even these agreements might, in time, have failed, as they had repeatedly failed before, if the more important lines of the country had not substituted the safeguards of an amalgamation of interests for those measures of co-operative restraint which an illy-considered and destructive statute had abolished.

The foregoing historic facts seem to prove beyond all question that compacts in restraint or regulative of rates

are an inevitable result of the evolution of the American Railroad System, and that they are not, as misrepresented, mere expressions of the volition of railroad managers. In the light of these historic facts it seems absurd to assume that the railroad should be adjudged as are carriers on disassociated free highways of commerce.

Laws of the United States which are incompatible with the Act of July 2, 1890, as interpreted by the Supreme Court of the United States.

Certain laws of the United States enacted prior to the Act of July 2, 1890, and regarded by the Supreme Court as being still in force, clearly recognize the economic and commercial conditions already mentioned, which discriminate the railroad from the free highway of commerce and mark the distinction between the railroad, as a carrier, and carriers on free highways.

As already indicated the Act of June 15, 1866, legalized those features of physical unity and of traffic co-operation which place wholesome limitations upon competition and beneficent restraints upon railroad rates. But the Act to Regulate Commerce, approved February 4, 1887, commonly known as "The Interstate Commerce Act," provided a system of regulation for interstate commerce, and a method of adjudicating the rights, obligations and liabilities of railroad companies utterly incompatible with the legal status of free highways of commerce. The Interstate Commerce Act is based upon those conditions which characterize a closely connected and intimately related railroad system controlled by all those co-operative restraints which physical unity and traffic unity render inevitable. Furthermore, the Interstate Commerce Act clearly legalizes the three essential elements of the particular traffic agreements which constituted the Trans-Missouri and Joint Traffic Associations, namely :

1. Agreements in regard to the uniform classification of freights.

2. Agreements for the purpose of preventing secret rate-cutting.

3. Agreements for preventing sudden changes of rates.

The Interstate Commerce Act also in terms recognizes rate agreements entered into between rival roads as being established by common usage and consent, and besides recognizes their legality by providing that they shall be filed with the Commission as documentary evidence of what are the legal rates. It further provides that such rates shall not be changed except upon due notice as prescribed by the statute.

In detail the Act of February 4, 1887, forbids unjust discrimination, and undue preferences or advantages. It provides also for printing and posting schedules of rates established by the companies, for ten days' public notice of advances in rates and three days' notice of reduction in rates and the filing of schedules of rates and joint tariffs with the Interstate Commerce Commission. It defines the liabilities of railroads as common carriers, provides penalties for violations of the Act and makes provision for a national Interstate Commerce Commission charged with the duty of preventing unjust discriminations, undue or unreasonable rates and all other violations of the Act, and with the duty of hearing and investigating all complaints and of determining the same. In case the carrier refuses to comply with the findings and orders of the Commission it is made the duty of any district attorney of the United States, upon the request of the commission, to institute in any proper court, and prosecute such cases under the direction of the Attorney-General of the United States.

The findings of the commission are in cases of appeal made prima facie evidence of each and every act found.

The burden of proof is thrown upon the carrier and the cost and expenses of such prosecution are paid out of the appropriation for the expenses of the courts of the United States.

This scheme of regulation is utterly inconsistent with the idea advanced by the Supreme Court that the railroads shall be regarded as independent competitors and be adjudged as are common carriers on free highways of commerce.

The practical operation of the scheme of regulation provided in the Interstate Commerce Act has been attended with a high degree of success. There is probably no inferior court of any State or of the United States from the decisions of which so few cases have been appealed as have been appealed from the quasi judicial conclusions of the commissions. In the year 1893 only 16 cases of alleged violations of the Act to Regulate Commerce came to a formal consideration and hearing, all the rest having been settled by the mediatorial officers of the commission. The success of the commission since the year 1893 has been no less marked.

On March 18, 1898, the Honorable Martin A. Knapp, declared before the Senate Committee on Interstate Commerce that "railroad charges which in and of themselves are exorbitant is pretty nearly an obsolete question." A communication from the Chairman of the Interstate Commerce Commission to the Senate, dated April 28, 1900, the same being in reply to a resolution of the Senate, told the whole story of the Commission's success in administering the Act to Regulate Commerce. From this communication it appears that during the ten years from April 16, 1890, to April 16, 1900, only 180 contested cases were decided by the commission, or only 18 a year out of the millions of transactions annually in the conduct of the freight traffic of

this country. Of these contested cases only 35 were appealed to the courts, an average of only 3½ a year.

The fact that the law of the United States for the regulation of railroad rates differs radically from the law of the free highway of commerce is due especially to the fact that the statute regulating the railroads recognizes and is conformable to those restraints upon rates imposed by the Act of June 15, 1866—the Charter of the American Railroad System—to those restraints imposed by uniform classifications of rates, and to the restraints necessarily imposed upon rates by those administrative means of self-control which preserve the orderly conduct of the railroad system of the country and constitute its administrative government. The fact must also be noted in this connection that the more important provisions of the Act to Regulate Commerce had previously been adopted by railroad federative associations as a result of the evolution of our national railroad system and has been proved to be fully entitled to legislative recognition. Indeed, the views proclaimed by Albert Fink prior to the passage of the Act to Regulate Commerce in regard to the prevention of unjust discrimination with respect to persons, places and commodities are somewhat in advance even of those of the present law both with respect to the ethical and the commercial considerations involved.

From the foregoing it is evident that the Act of July 2, 1890, forbids restraints upon rates recognized and legalized by the acts which constitute and sustain the American Railroad System, and which have been proved by the lessons of experience to be protective and promotive of the interests of commerce and industry. The only practicable recourse from this conflict of legislative provision seems to be in such amendment of the Act of July 2, 1890, as that herein proposed.

RESTRAINTS UPON TRADE AND COMMERCE.

The second apology of the Supreme Court for the Act of July 2, 1890, is that while a restraint upon trade by a private corporation might be valid under the general principles of law, in the absence of a statute prohibiting the same, any restraint by a railroad company "as affecting its rates of transportation *must be prejudicial to the public interests.*"

This is an hypothetical assumption, unsupported by any evidence adduced by the court. It is absolutely negatived by the experiences of the country, which prove the very reverse of the proposition of the Court, namely, that *railroad rates of transportation, as affected by restraints, have not been nor are they now prejudicial to, but are highly promotive of the public interests.* I shall attempt to prove the correctness of this counter proposition.

As already shown, railroad transportation in the United States has existed during the last thirty years under three fundamental conditions of restraint, namely:

FIRST. Restraints upon rates imposed by the physical unification of the American Railroad System;

SECOND. Restraints upon rates imposed by the generally conceded necessity of establishing uniform classifications of freight, and

THIRD. Restraints upon rates imposed by the necessity of actual rate agreements for the maintenance of the orderly conduct of railroad transportation.

These restraints upon rates of transportation are the result of the evolution of the American Railroad System, and not of the caprice or unrestrained volition of railroad managers. No intelligent and dispassionate observer of the course of the evolution of the American Railroad System will deny that such restraints have been vital to the success of the system, as well as to the orderly conduct of the

commercial and industrial interests of the country. The wonderful development of railroad transportation and of the interests of commerce and industry utterly dispel the idea that restraints upon rates have been "prejudicial to the public interests" and affords overwhelming evidence of the fact that such restraints have been *promotive of the public interests;* for it is impossible to disassociate fundamental conditions from the results of their application. These results are exhibited as follows:

The growth of the internal commerce of the country over railroads is clearly indicated by the following data showing the number of tons of freight carried and the number of tons of freight carried one mile in the United States, during the years 1860, 1882, 1890, and 1900:

YEAR.	NUMBER OF TONS CARRIED.	NUMBER OF TONS CARRIED ONE MILE.
*1860....	100,000,000	
1882....	360,490,375	39,302,209,249
1890....	961,344,437	79,192,985,125
1900....	1,071,431,919	141,162,109,413

*Estimated.

The growth of the railroad mileage of the United States is also indicative of the commercial and industrial interests of the country. This is exhibited as follows:

YEAR.	MILES IN OPERATION.	YEAR.	MILES IN OPERATION.
1832.....	229	1870.....	52,922
1840.....	2,118	1880.....	93,262
1850.....	9,021	1890.....	166,703
1860.....	30,626	1900.....	192,161

This table shows a rapid increase of railroad mileage. But, mile for mile, the railroad of to-day is a vastly improved and more efficient instrument of commerce as compared with the railroad of 1860 or even of 1870. The American Railroad System now affords greatly improved facilities for the continuity of traffic by virtue of its advanced physical and traffic unification. The facilities for the collection and distribution of freights have also been greatly improved; the average speed of trains has been increased, and the cost of transportation has been wonderfully reduced.

The wonderful reductions made in freight charges on the railroads of the United States and the five principal sections of the country is shown as follows for the years of 1870 and 1899:

Average receipts per ton, per mile, on railroads of the United States during the years 1870 and 1899:

RAILWAY LINES.	1870	1900
	Cents.	Cents.
Lines East of Chicago.....	1.61	55
Western and Northwestern Lines.....	2.61	89
Southwestern Lines.....	2.95	91
Southern Lines.....	2.39	63
Transcontinental Lines.....	4.50	93
Average.....	1.99	71

This data is taken from the Statistical abstract of the United States, published by the Chief of the Bureau of Statistics.

The average rate for 1900 was only 35% of the rate for 1870; conversely the rate for 1870 was 2.80 times the rate for 1900.

The actual reduction, 1.28 cents per ton per mile was nearly double the present rate per ton per mile. This re-

duction (1.28 cents per ton per mile) applied to the total number of tons carried one mile for the year ended June 30, 1890, as reported by the Interstate Commerce Commission, namely, 141,599,157,270 mileage tons amounts to $1,812,469,213 which is $763,212,890 in excess of the amount actually collected from freight during the year mentioned.

The cost of railroad transportation has not only exhibited an average reduction, but, as shown in the table, this reduction has been prevalent throughout the five great sections of the country to which it relates.

While conferring such enormous benefits upon the commercial and industrial interests of the country, the railroad companies have advanced the wages and otherwise improved the condition of their employes.

The production and demand for coal, pig iron and Bessemer steel bars are directly dependent upon the facilities for railroad transportation. The statistics showing the development of the industries are, therefore, indices of the efficiency and beneficence of the railroad system of the country.

COAL.—ANTHRACITE AND BITUMINOUS.

YEAR.	TOTAL PRODUCT.	YEAR.	TOTAL PRODUCT.
	Gross Tons.		Gross Tons.
1870.....	32,863,690	1890.....	140,382,729
1880.....	70,478,426	1900.....	240,235,966

PIG IRON.

YEAR.	PRODUCT.	YEAR.	PRODUCT.
	Gross Tons.		Gross Tons.
1870.....	1,665,179*	1890.....	9,202,703
1880.....	3,835,191	1900.....	13,789,242

STEEL OF ALL KINDS.

YEAR.	PRODUCT.	YEAR.	PRODUCT.
	Gross Tons.		Gross Tons.
1870.....	68,750	1890.....	4,277,071
1880.....	1,247,335	1899.....	10,639,857

In view of the fact that at least nine-tenths of the internal commerce of the country is carried on over railroads, and that the railroads have been the chief instrumentality in the development of the agricultural and mineral resources of the country as well as of its commercial and industrial interest, it is a matter of interest to note in this connection the increase in the wealth of the country as estimated by the various decennial censuses. This is shown as follows:

1850.....	$ 7,135,780,228
1860.....	16,159,616,068
1870.....	30,068,518,507
1880.....	43,642,000,000
1890.....	65,037,091,197
Estimated for 1900.....	94,000,000,000

Since the world was created no nation has ever been able to point to a record of progress such as that indicated by the foregoing data.

It is besides a matter of interest to note in this connection that the Hon. Carroll D. Wright, Commissioner of Labor, has recently shown that labor now receives a larger share of the market value of any product of labor to-day in this country than it formerly received, and, further, that the wages of labor have increased while the prices of the products of labor have decreased.

In the light of the foregoing facts it seems absurd to assume that railroad transportation in this country as sharply conditioned by limitations and by restraints upon rates has been prejudicial to the public interests.

The proof that the tendency of the sharply conditioned railroad transportation interests as to rates is not prejudicial to the public interests," but is promotive thereof is specifically indicated with respect both to the rates charged on the railroads comprising the late Trans-Missouri Association and the late Joint Traffic Association, to which associations the decisions of the Supreme Court here considered related. The following data, copied from the published data of the Bureau of Statistics of the Treasury Department, shows the decrease in the rates of transportation per ton per mile on the Transcontinental Railroads, the principal lines of the Trans-Missouri Association, for the years 1870, 1880, 1890 and 1894 to 1900, inclusive.

TRANSCONTINENTAL LINES.

YEAR.	RATE PER TON PER MILE.	YEAR.	RATE PER TON PER MILE.
	Cents.		Cents.
1870.....	4.50	1896.....	1.07
1880.....	2.21	1897.....	1.06
1890.....	1.50	1898.....	.99
1894.....	1.09	1899.....	.99
1895.....	1.06	1900.....	.93

From this table it appears that the average rate on the Trans-Missouri Railroads, restrained as to rates in the manner hereinbefore explained, fell from $4.50 per ton per mile in 1870 to less than one cent (.93 cents) per ton per mile in 1900, the rate in 1900 being only a little in excess of one-fifth of the rate in 1870. This clearly disproves the assumption that any restraint by a railroad company as affecting its rates of transportation "must be prejudicial to the public interests."

The rates of transportation on the railroads of the Joint Traffic Association, as stated by the Bureau of Statistics with respect to the principal lines east of Chicago exhibit the following decrease from 1870 to 1899:

LINES EAST OF CHICAGO.

YEAR.	RATE PER TON PER MILE.	YEAR.	RATE PER TON PER MILE.
	Cents.		Cents.
1870.....	1.61	1896.....	.60
1880.....	.87	1897.....	.59
1890.....	.63	1898.....	.55
1894.....	.63	1899.....	.51
1895.....	.61	1900.....	.55

This table also shows a steady downward tendency of rates, the average rate for 1900 being only about one-third the average rate for 1870. It also refutes the assumption of the Supreme Court that "a restraint by a railroad company as affecting its rates of transportation *must be prejudicial to the public interests.*"

Besides, these marvelous reductions in rates were accompanied by a phenomenal development of the internal commerce of the country over the lines embraced in the two associations herein referred to. The tonnage transported on the railroads of the Pacific Coast increased from 5,503,588 tons in 1885 to 22,524,092 tons in 1900, the tonnage of the railroads of the northwestern States increased from 16,835,340 tons in 1885 to 61,411,037 tons in 1900, and the tonnage of the Middle States increased from 189,619,916 tons in 1885 to 443,573,134 tons in 1900.

As the railroads composing the two associations here referred to were absolutely and unavoidably subject to the particular restraints upon rates which have hereinbefore been described, the facts thus presented as to the reduction of rates and the concurrent increase of traffic utterly dispel the idea that such restraints were "prejudicial to the public interests" in the two cases considered by the Supreme Court.

It must also be remembered that during the prevalence of the three forms of restraint upon rates which have been mentioned as incidents of the evolution of the American Railroad System, the facilities for railroad transportation have been improved to an extent probably equal in value to the advantages derived from reduced rates. This has not been "prejudicial" but manifestly *promotive* of the public interests.

But I turn to the official record. The reports of the Interstate Commerce Commission, not only prove that exorbitant rates are practically obsolete in this country, but that unjustly discriminating rates are infrequent and subject to the control of the commission. It is also a clearly established fact that railroad rates for transportation in the United States are lower than in any other country on the globe. There is, however, no pretense in all the business world that railroad rates in this country are not very cheap nor that the conduct of railroad transportation is not highly beneficial toward the public interests.

In the light of these facts I ask, what becomes of the unsupported hypothetical assertion that "any restraint imposed by a railroad company as affecting its rates of transportation *must be prejudicial to the public interests.*"

THE LEGAL ASPECT OF CONTRACTS IN RESTRAINT OF TRADE.

While the main object of this discussion is to prove from economic and commercial considerations and mainly from the facts of experience that the Act of July 2, 1890, ought to be so amended as to bring it into conformity with established principles of justice it seems proper in this connection briefly to allude to the legal aspects of the question.

The development of the law in regard to restraints upon trade is indicated by the following citations:

(*a*) In Dier's case, reported in the Year Book 2, Henry V, fol. 5, p. 26 [A. D. 1414], a dyer was bound that he should not use the dyer's craff for two years; and it was held that the bond was against common law.

(*b*) In the case of Mitchell *vs.* Reynolds, decided about the year 1711, nearly two hundred years ago, and reported in "Smith's Leading Cases," the policy of the law of England at that time is stated as follows:

"The present doctrine is that while contracts in total restraint of trade are void, yet if the restraints imposed be partial, reasonable and founded on good consideration they are valid and will be enforced."

(*c*) The following view is expressed in the case of Atcheson *vs.* Mallon, 43 N. Y., 147, (1870). Folger, J.

"A joint proposal, the result of honest co-operation though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed and not secret. * * * The public may obtain at least the benefit of the joint responsibility and of the joint ability to do the service."

(*d*) In the case of Matthews *vs.* The Associated Press of New York, involving a by-law forbidding its members from receiving or publishing the news despatches of any other news association, the Court of Appeals of the State of New York decided that the restraint was just and reasonable. The court declared that such manifest restraint upon the freedom of contract would have a tendency to strengthen the association and to render it more capable of filling the duty it was incorporated to perform (136 N. Y., 333). In this the court recognized the fact that the enormous enterprises of the present age require for their successful operation great scope and enormous proportions, and that they must be protected in their integrity in order

that the public may to the fullest extent enjoy the results which they produce.

(*e*) The rule in regard to restraints of trade is stated by the Supreme Court of the United States in Oregon Steam Navigation Co. *vs.* Winsor (20 Wallace 64, 66), where it is said that "an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade, is good, provided it be not unreasonable and there be a consideration to support it."

The doctrine of contracts in restraint of trade has had a progressive development during the last six hundred years.

The decision in Dier's case was based upon the idea of forbidding any contract in restraint of the liberty of the subject to compete in any occupation. In the case of Mitchell *vs.* Reynolds, decided in 1711, the doctrine rested upon the distinction between general and partial restraints. In the case of Nordenfelt *vs.* Nordenfelt Guns and Ammunition Company, decided in 1894 [House of Lords App. Cas. p. 536] the validity of contracts in restraint of trade was made to depend upon the question as to whether the restraint was reasonable or unreasonable.

The development of the doctrine of contracts in restraint or regulative of trade, as indicated in the later citations, has, however, brought it up to the idea of enabling men so to combine their efforts and capital as to realize the largest possible results for the public good. Still the limitation prevails that all such restraints must be just and reasonable, or in other words, conformed to established principles of public policy.

The glaring error of the Act of July 2, 1890, is that it not only abolishes these proper limitations upon restraints, but at the same time abolishes even those beneficient restraints which are of the very essence of that co-operation which has been the chief stimulus and condition of modern pro-

gress. This specifically defines the legislative misadventure of the anti-trust act.

Mr. Justice White, in his dissenting opinion, has aptly observed that trade contracts generally restrain trade in some respects, and therefore that a law forbidding "every contract which in any degree produced that effect would be equivalent to saying that there should be no trade."

The subject of contracts in restraints of trade is clearly and ably stated in the views of the four dissenting Supreme Court Justices in the Trans-Missouri case. Therein it is explained that in forbidding every contract in restraint of trade the Act of Congress is "a departure from the general principles of law;" * * * "unreasonable and violative of the elementary principles of justice." The justices who rendered the decision of the Court did not deem it necessary to deny these propositions in order to maintain their position, but fell back upon the doctrine that the judiciary is powerless to declare an act of the legislature void for the reason that it is violative of an abstract principle of justice unless such power is clearly granted by the Constitution of the United States.

I have not here attempted to controvert this doctrine further than to point to its extreme impolicy, and the menace which it presents to commercial and industrial liberty.

Next in order to the object of forming "a more perfect union," the preamble to the Constitution declares that it was the purpose of the people of this country to establish justice." Hence the momentous question arises was the curtailment of the judicial power by the Act of July 2, 1890, a legitimate exercise of the powers of Congress? Can Congress by statutory enactment thus limit the power conferred by the Constitution upon the federal judiciary? If the federal judiciary can be divested of its power to dispense justice in a manner so clear and so important to the country as that which commanded the attention of the

courts in the Trans-Missouri and Joint Traffic cases, what barrier is there to the further and indefinite curtailment of "the judicial power of the United States?" These are questions which appeal to the American love of liberty and to the common desire for the protection of the general welfare.

The decision that the Act of July 1, 1890, is not subject to judicial review upon considerations of justice or of public policy seems to indicate that private rights and the public welfare may not be adequately protected against possible unjust legislation even by the constitutional provision that "no person shall be deprived of life, liberty or property without due process of law."

In view of the history of the evolution of the American Railroad System and of the concurrent evolution of the commercial, industrial and financial interests of this country, it appears wildly absurd to assume that the restraints imposed upon railroad interaction by the unification of the system and the developed means of its administration have been opposed to the public interests or that they conflict with accepted views of public policy. On the other hand, it is beyond all doubt that such restraints are vital to the orderly conduct of the railroad transportation interests of the United States and to the very existence of the present commercial order of the country.

In view of the history of its enactment it would be harsh judgment to regard the Act of July 2, 1890, in any more serious light than that of a legislative misadventure.

COMPETITION AND COMBINATION.

The third assumption of the Supreme Court in defense of the Act of July 2, 1890, is that *free competition is the general and inviolable law of trade.* The ideas expressed upon this subject by Judge Oliver P. Shiras, United States District Judge, of the Northern District of Iowa, in the

Trans-Missouri case were quoted with approbation and fully adopted by the Supreme Court. Judge Shiras declared that "Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life," and again, "the law of competition remains as the controlling element in the business world." Neither Judge Shiras nor the Supreme Court presented or referred to any facts of human experience which justify or even appear to justify these declarations. They are absolutely unsupported by any fact of experience. They have no authoritative expression either in statute law or in sound economic principles. They are mere expressions of suppositious law, based upon fanciful adages and aphorisms, and are utterly refuted by reason and by the lessons of experience. With quite as much support in the experiences of the business world the above quoted expressions might be paraphrased by substituting the word *combination* for the word competition, so that they whould read as follows: *Combination, free and unrestrained, is the general rule which governs all the ordinary business pursuits and transactions of life*, and again, *the law of combination remains a controlling element in the business world.*

As both competition and combination are expressions of human traits, light may be thrown upon the subject by considering them in their moral and intellectual aspects. Individuality leads men to struggle with their fellows for the acquisition of everything worth having and holding, for we live in a world in which we are all debating. On the other hand, an equally virile human trait—the social instinct—leads men to associate themselves together in co-operative enterprise. Such association is a symptom of the moral and intellectual advancement of the race. Since the world began man's faith in his fellow man was never before so pronounced as it is to-day. This is

manifested in innumerable forms of social, industrial and intellectual co-operation. Out of these conflicting dispositions has sprung the habit of competition and the habit of combination. The struggle between these forces has begotten two maxims, namely, "competition is the life of trade," and "in union there is strength." Neither of these maxims affords an infallible guide in the affairs of life. In many instances competition kills trade by constriction. There are also combinations for good and combinations for evil. Many combinations perish of their own weight and lack of vitality. Besides, the life of trade is a subjective element. It has its origin and force in human intelligence, ambition and acquisitiveness. Combination and competition are the centrifugal and centripetal forces of human interaction, which hold individual enterprise in its proper orbits. Together they operate as the balance wheel of self-government.

Declarations in regard to "*the law of competition*," or "*the law of combination*," are mere abstractions, and are misleading. There can be no sensible code of human law other than that applicable to man in his external relations to his fellow man. The idea of investing suppositious law with an aspect of infallibility simply tends to "darken counsel by words without knowledge." The laws of God are universal, constant and consistent, whereas the laws of man are limited, inconstant and conflicting. It is the ever present infirmity of human law that circumstances govern cases. Hence the science of human law and of government is essentially a science of limitations and restraints. Surely it is a new and revolutionary idea in law and in human experiences that a restraint is necessarily a condition of evil. The strength of our complex and involved social and industrial life consists mainly in the wholesome restraints which have been provided against disintegrating and destructive tendencies. We are all tethered in a thousand

ways for our mutual comfort and advancement. And yet, in the face of the lessons of experience, men suffer themselves to be misled by fanciful adages and aphorisms into the belief that, for example, a great unified system of transportation, to the exigencies of which the commercial and industrial interests of this vast country have become conformed can possibly exist in the absence of co-operative and order-maintaining restraints. Thus the delusion has been propagated that such restraints "must thereby be prejudicial to the public interests."

There are two adages which in particular have led to fallacious views such as those alluded to. One of these is that "Competition is the life of trade." In human experience there is quite as much to prove that *combination is the life of trade* or that *competition is the death of trade.* Judge Howe, of Wisconsin, in the case of Kellogg *vs.* Larkin (3 Pinney, Wis. Rep., 150), said, "I believe universal observation will attest that for the last quarter of a century competition in trade has caused more individual distress if not more public injury, than the want of competition."

The other adage to which I allude is that "where combination is possible, competition is impossible." This is attributed to George Stephenson, of England. In the line of his professional pursuits Stephenson was a wonderful man. By his unaided genius, faculty and endeavor he rose from the position of common laborer to that of the foremost engineer of the world. He could invent a locomotive, but he was lost when he undertook to prescribe a law for the commercial interaction of the busy world. The fact stands that since the dawn of creation competition was never before so virile, never before so extensively operative and never before so full of inspiration to wholesome effort as it is to-day. And the co-existent fact is also as clearly apparent, namely, that combination, the visible outcome of the the spirit of co-operation, was never before

so virile, never before so extensively operative, never before so full of inspiration to grand achievements and never before so productive of beneficent results as it is to-day. This is a fact of the living present clear to the vision of every man who, with unclouded vision is cognizant of the workings of the busy world about him.

Aphorisms and adages supply a useful purpose only so long as they furnish condensed expressions of popular beliefs and are apparently in accord with the verdict of human experiences. But it is an abuse of language to invest them with the attribute of law. The assertion that the general results of competition are always beneficent and that the general results of combination are always evil is absolutely refuted by the lessons of human experience. This has already been proven by facts illustrative of the results of co-operative restraints upon railroad transportation.

It is the verdict of the civilized world that there can be no great commercial or industrial enterprise which is not safeguarded by conventional arrangements based upon enlightened views of self-interest. It is besides one of the clearest facts of the age that competition and combination must both be regulated and restrained, and that both must be defended against unjust revolutionary assaults. As recently remarked by Senator Hoar "imperial forces must be subjected to imperial restraints." This is the exalted work of statesmanship.

In order to place the railroads of the country in the relation to each other of free competitors it would evidently be necessary to completely disassociate them and thus to destroy the American Railroad System. But this is too absurd for serious consideration.

The fact that the particular restraints upon rates hereinbefore described constitute the vital principle of our internal commerce, and that they have wrought such grand re-

sults utterly dispels the idea that the inhibition of the Act of July 2, 1890, is based upon any sound principle or expedient of public policy.

The attempt to evade these unwelcome truths of experience has led to the glaring solicism that unrestrained competition is the "controlling element in the business world."

THE PROPOSED AMENDMENT OF THE LAW.

In view of the foregoing it is proposed that the Act of July 2, 1890, shall be amended by inserting in the first section the words *unjustly or unreasonably* so that it shall read as follows: "Every contract, combination in the form of trust or otherwise, *unjustly or unreasonadly* in restraint of trade or commerce and every conspiracy in restraint of trade or commerce * * * is hereby declared to be illegal." It is also proposed that the words *unjustly or unreasonably* shall, in like manner, be inserted in sections two and three. Such amendment would bring the Act strictly into harmony with its title which reads, "An Act to protect trade and commerce against *unlawful* restraint and monopolies." The history of the bill in Congress indicates that this was the meaning which the Senate intended that it should have.

The problem of suppressing agreements in restraint of trade is an old one—a very old one. During the last two hundred years the question has been several times solved or adjusted, and each time under different economic and commercial conditions and according to the dictates of the different views of public policy. The subject has had a progressive development, in law and in the public understanding the tendency being constantly toward broader views as to the rights both of capital and of labor. This has been expressed in a constantly increasing favor toward cooperative enterprise and a better appreciation of the advantages to be acquired by organization and by the con-

solidation of business agencies. The whole trend of the social evolution of the world has been in the direction of combination. By this means the most important advances have been made in commerce and in industry.

But, by what is believed to have been a mere legislative misadventure a law was enacted by the Congress of the United States, the Act of July 2, 1890, which as judicially determined declares that every restraint upon trade or commerce is illegal, thus, to the extent to which it applies, repudiating all that had been inculcated by the lessons of experience and the manifest dictates of public policy regarding commercial and industrial interaction. In the attempt to remove an assumed evil, a blow was struck at every restraint embracing even those which as hereinbefore shown have redounded to the advancement of commerce, and to the general prosperity of the country. Let us remove the blight cast upon the civilization of the age by a statute which discards the distinction between what is just and what is unjust, between what is reasonable and what is unreasonable, between what is conformed to sound principles of public policy and what is opposed to sound principles of public policy, and which at the same time, as indicated by the Supreme Court, curtails the judicial power in a manner which constitutes a menace to the freedom of commerce and to the liberties of the people.